Supreme Court, U.S.
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No. 93-1054

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CONFECCIONES ZUNY LTDA., MANFACTURAS DE MODAS LTDA., INCOLCO LTDA., VALERY FASHIONS LTDA., CREACIONES KAREN, LTDA., TOTE EXPORT MANUFACTURAS LTDA., AND CREACCIONES IVONNE LTDA.,

Petitioners,

V.

UNTED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BREIF IN OPPOSITION

The petitioners, Confecciones Zuny LTDA. ("Zuny"), Manfacturas de Modas LTDA. ("Modas"), Incolco LTDA. ("Incolco"), Valery Fashions LTDA. ("Valery"), Creaciones Karen, LTDA. ("Karen"), Tote Export Manufacturas LTDA. ("Tote"), and Creacciones Ivonne LTDA. ("Ivonne" and collectively "the Barranquilla Claimants") reply to the brief in opposition filed by the United States as follows.

PRELIMINARY STATEMENT

As much as the government would like to characterize the Petition as a "fact fight" not worthy of this Court's attention, the opposite is demonstrated when this case is analyzed upon the uncontested facts and law. Pursuant to Rule 15.1, Supreme Court Rules, as the

government has not disputed the following facts and law in their brief in opposition, these facts should taken as uncontested:

> **The Search of the Wire Transfers** - The In Rem Warrants (i) were used to monitor "**all transactions** which order that funds be transferred through Banco Atlantico to **any** banks in Colombia" and (ii) did not identify nine of the eleven seized "res'" claimed by the Barranquilla Claimants prior to the seizure. The scope of such a warrant violates the particularity clause of the Fourth Amendment.
>
> **The Seizure** - Exigent circumstances notwithstanding, the government did not articulate the basis for each of the eleven extra-judicial seizures at the post-seizure probable cause hearing -- therefore, the seizures were not based upon probable cause. As such, they violated the judicially created "exigent circumstance" exception to the Fourth Amendment.
>
> **The Forfeiture** - The ordered forfeiture of each of the eleven "res'" was done (i) upon evidence submitted ex parte and in camera

> and (ii) without any connection of any of the indicia of each "res" with the proceeds of narcotic transactions. As such the forfeiture violates procedural and substantive due process.

Accordingly, as the warrants were prohibited general warrants, their fruits must be suppressed. Moreover, as the seizures were made without probable cause, the evidence obtained from them must likewise be suppressed. Finally, as the forfeiture was ordered based on evidence never presented to the Barranquilla Claimants and without connection of each "res" to illegal activities, the funds must be returned to the respective Barranquilla Claimants.

ARGUMENT

I.

The Search of the Wire Transfers Violated the Fourth Amendment

A. The Warrants of Arrest of Article-in-Rem Were General Warrants

Most noteworthy of the government's response to the Barranquilla Claimants' claim that the warrants of arrest of article-in-rem were prohibited general warrants is the complete failure to respond to that claim. Indeed, in ¶1(a) of its brief the government's response is that the warrants satisfied Supplemental Rule E(2)(a)'s particularity requirement. While that Rule addresses pleading specificity concerns, it is inapplicable to the Barranquilla Claimants' challenge regarding the practical scope and use of the warrants of arrest of articles-in-rem in this matter.

Instead, the points of the Barranquilla Claimants which are uncontested by the government are simply that:

> 1. The government commenced the action against Merrill Lynch in Columbus, Ohio and obtained from the Clerk of the Court for the Eastern District of New York warrants of arrest of article-in-rem which it then served on banks in New York not named in the action. (C.A. App. A63-122)
>
> 2. The government then orally instructed those banks to "request instructions from [the U.S. Attorney's] office **prior** to effecting the [wire] transfer[s to Colombia]." (C.A. App. A274, emphasis added)
>
> 3. The banks then "fax[ed] a copy of the transaction to [the assistant U.S. Attorney] and then he would, same day or the next day the latest, tell us over the phone, "Okay, you are supposed to freeze this transaction as well." And then usually the **same day or the day after** we would get the legal document with those instructions. (C.A. App. A1329-1331, emphasis added)

This practice of utilizing a warrant of arrest of

article-in-rem to commence domestic monitoring of wire transfers completely vitiates the protections of the Fourth Amendment. The judiciary is rendered obsolete as it no longer is needed to oversee the use of this extraordinary power by the executive branch.

As the Fourth Amendment now clearly is applicable to the civil forfeiture context, the incompatibility of the practice of the U.S. Attorney's office in the exercise of its power under the warrant of arrest of article-in-rem and the requirements of the Fourth Amendment's particularity clause must be resolved. United States v. James Daniel Good Real Property, 114 S.Ct. 492 (1993). To maintain, as the government does at ¶1(c) of its brief, that the Barranquilla Claimants have no expectation of privacy in the wire transfers destined to them creates, if confirmed by

a denial of this Petition, an electronic "super highway" open to indiscriminate monitoring by the government. On the verge of the explosion of this medium for communications, such a proposition must be carefully scrutinized in order to maintain the isolation of the government, as envisioned in the Fourth Amendment, from the affairs of the citizenry.

B. The Warrantless Seizures Lack Probable Cause

The government maintains in ¶1(b) of its brief that "[w]hen wire transfers addressed to suspect beneficiaries in Colombia were received by New York banks, the government had probable cause to make the [warrantless] seizures." This argument completely overlooks the point detailed above: the Barranquilla Claimants did not become "suspect" until after their funds had been seized. Indisputably, if the Barranquilla Claimants had been

"suspect" prior to the search and seizure of their funds, their names would have appeared on the amended complaints in rem which preceded the seizures. That happened in only three of the eleven seizures claimed by the Barranquilla Claimants.

Moreover, the government's quotation in the same paragraph of the Court of Appeals' conclusion that the government knew at the time it seized the funds that "Santacruz-Londono . . . would probably be directing the transfer of illicit income through New York bank to the accounts of several of his 'businesses' in Columbia" is without a factual basis. First, the government relies upon the Court of Appeals conclusory statement -- presumably taken from the trial proof -- it does not provide the factual underpinning which might substantiate its claim that the

Barranquilla Claimants belonged to Santacruz-Londono: Indeed, there isn't any.

Additionally, if the government had reason to believe prior to the search and seizure that the Barranquilla Claimants were "owned" by Santacruz-Londono, why didn't the complaints in rem identify the Barranquilla Claimants prior to the search and seizure? The plain answer is the government did not have such knowledge at the time of the search and seizure.[1]

C. Exigent Circumstance Do Not Obviate The Need For Probable Cause

Last, at ¶1(c), the government maintains that "exigent circumstances justified the seizures, and prior judicial

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[1] Perhaps the Attorney General's memorandum regarding the need to increase the volume of forfeitures in 1990 and quoted at footnote 2 of the majority's opinion in Good provides some insight.

authorization was not needed." The Barranquilla Claimants have no argument with this proposition as, under the facts as they evolved in this case, the wire transfers clearly possessed the ability to leave the jurisdiction quickly. But it only half states the law.

The existence of exigent circumstances does not remove the requirement that probable cause to search and seize exist prior to the search and seizure. It only displaces the timing of the judicial examination of the basis for the search and seizure. Here, the government never demonstrated that it possessed probable cause to believe that any of the eleven wire transfers were the proceeds of narcotic transactions prior to the search and seizure of those transfers. The proof of this assertion is found in the arguments above and the complete lack of proof connecting

the seized res' with narcotic trafficking as presented at the probable cause hearing held 10 months after the seizures as detailed in Point III below.

II.

The Barranquilla Claimants Funds Were Ordered Forfeited Based Upon In Camera, Ex Parte Evidence

Clearly, as it did not object, the government concedes that property may not be ordered forfeited based upon evidence submitted in camera and ex parte. Hence, as the only argument available to it, the government attempts to create a "fact fight" by vague citations about what transpired to obfuscate the sequence and significance of the finding of probable cause to forfeit the Barranquilla Claimants' funds.

In fact, what transpired was this:

1/17/91 In response to a motion to stay discovery by the government, the

magistrate appropriately ordered an in camera and ex parte hearing. (C.A. App. A493)

2/20/91 — The magistrate enters his recommendation to stay discovery based upon the in camera and ex parte hearing. (C.A. App. A510)

3/26/91 — The district court refers the case back to the magistrate to make a determination as to whether there is probable cause to believe that any or all of the funds seized are "proceeds" of narcotic transactions based solely upon the in camera and ex parte submissions of the government. (C.A. App. A622)

5/13/91 — The magistrate issues his order finding probable cause to forfeit all of the seized funds. (C.A. App. A673)

Under this chronology, the context of the comments of the district court at the hearing held June 7, 1991, clearly demonstrate that it was relying upon the magistrate's finding of May 13 in determining that probable cause existed to

forfeit the funds. As such, the Barranquilla Claimants' funds were ordered forfeited based upon the in camera and ex parte determination of the magistrate.

First, the government's assertion at ¶2 of its brief that the statements of the district court on June 7, 1991, at the conclusion of the three day probable cause hearing do not relate to the Barranquilla Claimants is wrong as (i) they do not provide to the Court the basis of that conclusion and (ii) examination of the mediate parts of that colloquy establishes just the opposite.

The statements of the district court regarding reliance upon the magistrate's finding related to all claimants:

> MR. MCGUIRK (Attorney for one non-petitioning claimant): What you can do is after 10 months require [the government] to show probable cause. They haven't shown probable cause in what is probably the longest seizure --

THE COURT: Certainly haven't shown it in public. Whether they've shown it in private I can't say. They may have shown it in private. They haven't shown it in public. When are you going to indict? (C.A. App. A1261)

* * *

THE COURT: What are the clients' wish, are they putting on good faith?

MR. MCGUIRK: Innocent owner defense?

THE COURT: Yes

MR. MCGUIRK: I'm not prepared to today, simply because there was a question whether we were going to be permitted to. Now, we would like --

THE COURT: I'll permit you to. Why not?

MR. SIBLEY (Attorney for Barranquilla Claimants): That's going to make this into a trial. I thought this was a probable cause hearing. . . (C.A. App. A1262-1263)

* * *

MR. HUI (Assistant United States Attorney): . . . More importantly, if these claimants really are

asserting innocent owner defense, let us get on with discovery of their clients. Let us take their depositions. Then we can adequately explore prior to trial the bases of their innocent owner claim.

MR. MCGUIRK: Obviously the government wants to hold their money, refuse us discovery, has refused to demonstrate that as the Court has indicated probable cause to hold our money.

THE COURT: Not in public.

MR. MCGUIRK: In public. We don't know that they have done so privately. (C.A. App. A1267)

* * *

MR. MCGUIRK: Your Honor, my sense of the hearing today is that the Court is waiting to determine probable cause based on briefs or is ruling on it or may I inquire what we're doing?

THE COURT: I would like to look at the briefs. I'm asking you whether you want me to look at these documents in camera.

MR. HUI: We would like you.

THE COURT: **If not, I'll decide on what I have, what the magistrate has because he has,**

> **apparently, looked at all of these things.** (emphasis added).
>
> MR. MCGUIRK: On behalf of INDUCOF, we object. We think 10 months -- well, the answer to your question is no. We object. We feel that the government should be required to present their probable cause in court subject to cross-examination or not be permitted to rely on it.
>
> THE COURT: I will then rule immediately that given the circumstances they have sufficiently established probable cause in each case . . . (C.A. App. A1277-1278)

This extended colloquy demonstrates the district court was (i) referring to all the claimants represented at the hearing and (ii) was expressly relying upon the magistrate's in camera and ex parte determination of probable cause to forfeit in making its determination. As such, in practice, the Barranquilla Claimants' funds were ordered forfeited based upon evidence that never saw the light of day. As the government implicitly concedes, such a proposition is at

complete odds with due process.

III.

No Evidence Connected The Specific Funds Seized As The "Proceeds" Of Narcotics Trafficking

The res' seized, electronic wire transfers, have only five possible indica. They are: (i) the source of the funds; (ii) the destination of the funds; (iii) the identity of the conduit banks for the transfer of the funds; (iv) the date of the transfer; and (v) the amount of the transfer. Hence, in the legal fiction of an in rem forfeiture proceedings alleging that the funds are the "proceeds" of narcotic transactions, some connection between at least one of these indicia and narcotic activity must be present to establish a basis to order a forfeiture. Otherwise, no proof regarding the "guilty" nature of the "res" would exist.

The government's response is to stay that such "connection" existed. At ¶3 of its brief, the government relies upon the Second Circuit's conclusion that "the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking. Pet. App. A151."

However, that citation relates to the quality of evidence submitted at trial by the government, not at the three day probable cause hearing. Obviously, at trial, the burden of proof had already shifted to the Barranquilla Claimants. Ergo, the trial evidence is not mediate to a determination of whether the government has met its burden to initially establish probable cause to forfeit. That burden is found at 19 U.S.C. §1615 which requires that "probable cause shall be first shown for the institution of such suit or

action, to be judged of by the court . . . ."

Thus, in so much as the government does not contradict the Barranquilla Claimants' assertion regarding the complete lack of proof regarding "connection" at the three day probable cause hearing, it should be taken as true by the Court. That assertion is simply that at the probable cause hearing, "the United States never showed probable cause for institution of the suit against each wire transfer". (Pet. 39)

Hence, the proposition will remain, unless reviewed by this Court, that the government may seize and forfeit wire transfers without demonstrating a connection between narcotics activity and either the source, destination, transfer conduit, date or amount of the transfer. Such a proposition elevates forfeiture procedure and practice to new levels of

intrusive behavior and thus should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this Court should exercise its jurisdiction and grant this Petition.

Respectfully submitted,

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